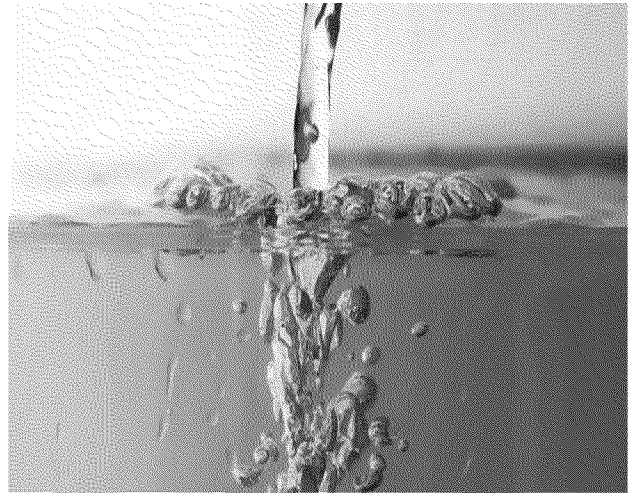


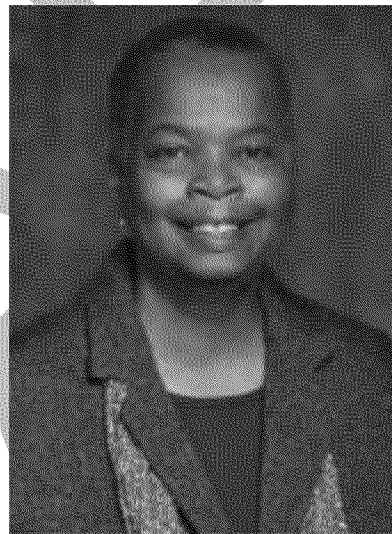
Protecting our rivers, lakes, streams and wetlands and keeping them healthy and safe is the responsibility of all levels of government. At the same time costs of treatment should not be transferred to the directly to rate payer - *at the tap*.

B. Local Governments and Cooperative Federalism

The Clean Water Act (CWA) as amended in 1972, established the basic structure for protecting our nation's water resources by regulating pollutant discharges into the waters of the United States. Clean Water Act programs are largely federal, state and tribal programs.



In Portland, Maine, we're lucky to have water resources at our door step. Water is vital to our regional economy and way of life. Therefore, our city and regional stakeholders collaborate with state and national partners to ensure we keep our rivers, streams, and bays clean. Everyone plays an important role!
Councilor Jill Duson, Portland, ME



Councilor Jill Duson, Portland, ME
and Vice-Chair of the LGAC

The Clean Water Act applies to "navigable waters," defined in the statute as "waters of the United States." On February 28, 2017, the President of the United States issued an Executive Order directing EPA and Department of the Army to review and rescind or revise the 2015 Rule. The EPA and the U.S. Army Corps of Engineers are in the process of considering a revised definition of "Waters of the United States" consistent with the Executive Order. Local governments support a straight-forward rulemaking process, inclusive of the tenants of cooperative federalism. This approach acknowledges the shared responsibility of state and local governments in the governance and cooperation to work out details of responsibility.

The CWA Section 404 is jointly administered by EPA and the Corps of Engineers and regulates discharges of dredged or fill materials into Waters of the United States, including wetlands. CWA Section 404 is largely federal with the exception of a small number of State Assumed 404 Programs (Michigan and New Jersey). If empowered, states and tribes could play an increased and more efficient

role in managing the program. Local governments too, have a strong role to play and can be key strategic partners in protecting our nation's water resources. Local governments manage broader water quality protection efforts such as managing stormwater, flood protection and enhanced watershed protection along with protecting the sources of drinking water.

Local governments have the tools to strengthen wetland and stream protection efforts that better support community goals with greater protection for the resource. Integrated Planning (IP) offers municipalities the opportunity to meet multiple Clean Water Act requirements by sequencing separate wastewater and stormwater programs while maximizing investments so that the highest priority projects come first. EPA, states, and municipalities have achieved progress in implementing IP approaches while addressing the most serious water quality issues in order of priority to protect public health and the environment.

"We should be gravely concerned about the minimization of the federal role in the Clean Water Act. Any changes at the federal level must be accompanied by the commitment and action to enhance protection by state and local officials. This requires frank discussion given the financial challenges faced by some local communities and states."

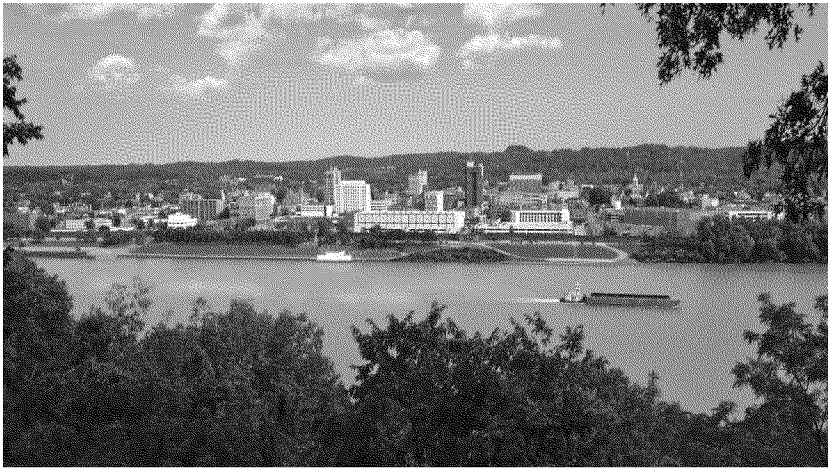
Mayor Karen Freeman-Wilson, Gary, IN



Mayor Karen Freeman-Wilson, Gary, IN

C. Clarity and Predictability

A central theme heard by the LGAC in public meetings of state, local and tribal government officials on the 2015 'Waters of the U.S.' rule is that definitions were too broad or confusing and were subject to interpretation through litigation. Key terms used in the WOTUS rule are vague such as "uplands," "tributary," "floodplain," "significant nexus," "adjacent," and "neighboring" but are also important in defining what waters are jurisdictional. These terms are either broadly defined, or not defined at all which has led to further confusion, not less, over what waters fall within federal jurisdiction. Local governments need a rule that puts forward clear definitions and provides examples and graphics for further clarity. Without this clarity, it could lead to further unpredictability and result in unnecessary project delays, subjective judgements and inconsistency across the country.



D. Flexibility and Regionalization

In formulating a revised 'Waters of the U.S.' rule it should have flexibility and reflect natural and regional variability of our nation's waters. As a basic approach, criteria could be established that recognizes natural ecoregions (delineated on the basis of natural and anthropogenic factors) to recognize geographic variability

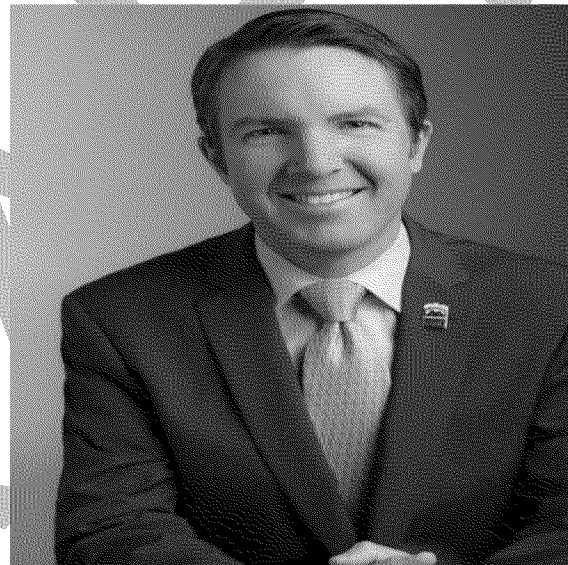
337 Ohio River, City of Huntington, West Virginia
338 Photo Source: Huntington Quarterly

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"In the West, water quantity is a challenge, but quality is equally important. Protecting watershed health of the eastern Sierra is crucial to northern Nevada local communities."

**Council Member David Bobzien,
Reno, NV**

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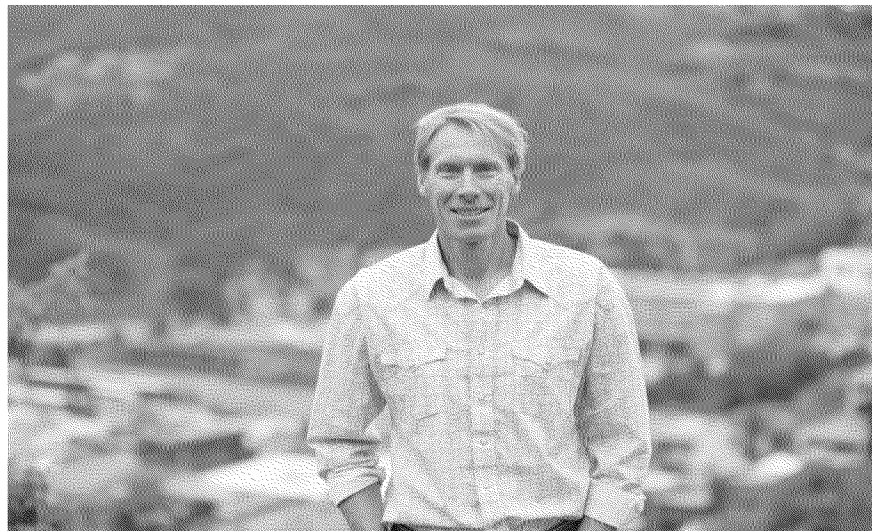
Council Member David Bobzien, Reno, NV

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343 among regions. States and tribes should have further input in this process to modify or improve on this
344 basic approach. Workgroups made up of federal, state and local officials could help establish local
345 delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and
346 regional waterbodies such other unique wetlands such as pocosins, Carolina bays etc. should be factored.

“Park City is a small western community of 8,000 with big water challenges. We work closely with our EPA Region 8 office to help solve our water issues. The EPA is not just a regulatory agency, but is an essential resource to help us address our legacy mining issues and its environmental impacts.” Council Member Andy Beerman, Park City, UT

delineation factors characteristic of these regional waterbodies such as western ephemeral streams, and other unique wetlands such as pocosins, Carolina bays etc. should be factored.



Council Member Andy Beerman, Park City, UT

Western arid streams may need further regional determinations as whether these areas are washes and otherwise dry channels characterized by irregular (not seasonal) ephemeral flows or may actually qualify as waters of the United States. These jurisdictional calls of WOTUS should be the exception rather than the rule. Also, wetlands and streams in the State of Florida also should be considered in separate regional guidance since most of the State could be classified as a Waters of the U.S. due to high groundwater tables and surface connections with waters of the U.S.



Arroyos are common geographic water features in the arid west. The examples in these photographs are non-permanent, ephemeral waters that only carry water during extreme precipitation events. This is an example of land structures which cause confusion under a one size fits all approach.” Image Credit: Dripping Springs Road and Baylor Canyon Road Improvement Project Environmental Assessment, BLM & FHWA, April 2015.

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Homestake Reservoir – Pitkin and Eagle Counties, Colorado
Photo Source: City of Aurora, CO



Back Cove runner with Portland ME skyline
Photo Source: Corey Templeton Photography

E. Enhanced State and Local Government Role

States play a vital role in the protection of wetlands by addressing waters and activities that *are not* regulated under the Section 404 program, or by imposing additional limits on activities that *are* regulated under that program. Pursuant to Section 404(g) of the Clean Water Act, a state can *assume* the authority to issue permits for the discharge of dredged or fill material into waters regulated under the Clean Water Act *other than traditional navigable waters or waters seaward of the high water mark*. See 33 U.S.C. § 1344(g). EPA's regulations also authorize tribes to assume Section 404 permitting authority within their jurisdiction (40 C.F.R. § 233.2). In order to assume the Section 404 permitting program, a state must enact laws and regulations to create a program that meets requirements designed to ensure that the state can administer the Section 404 permitting program as the Corps. This process could be streamlined and could be incentivized for state assumption. States can play a greater role in the administration of the federal program and streamline permitting for developers in the state through State Programmatic General Permits. CWA Section 404(e) authorizes the Corps of Engineers to issue general permits "on a state, regional or nationwide basis for any category of activities involving discharges of dredged or fill material" if there are only minimal adverse environmental effects.

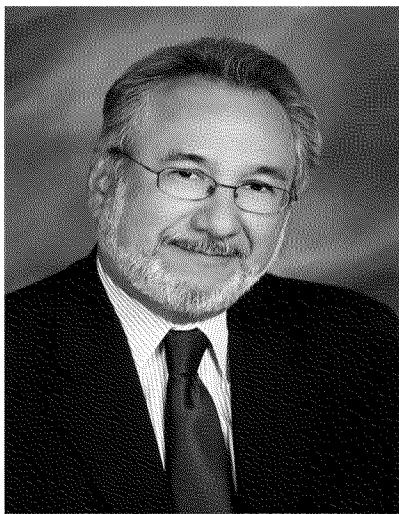
Local regulation of wetlands in addition to the state and federal programs have many benefits as well. Local decision makers have numerous land use tools available that can be more effective, and with less cost, protect sensitive landscapes valuable to their community such as with building permits, zoning authority, sanitary and health codes, and soil erosion control.

F. Scalia Approach: Challenges and Opportunities

Local governments, in general, support a narrow interpretation of the Clean Water jurisdiction. The Scalia opinion applies a narrow interpretation to CWA jurisdiction. Such an interpretation would extend

jurisdiction to only “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. The LGAC puts forth an approach that would yield categorical answers of jurisdiction of ‘yes’, ‘no’ or ‘maybe’ using criteria such as contained within the 2008 guidance and consistent with the Scalia approach.

Local governments are also concerned about the assurances that water resources which provide (or potentially provide) our communities’ drinking water and source water are regulated and protected. These significant waterbodies form the assets of our water infrastructure and these areas may or may not fall within the Scalia interpretation as “connected to a federal navigable waterway.” Local governments would support States and Tribes assisting to identify these significant waterbodies by delineating and mapping these significant ‘Waters of the State’. These areas once identified should have primacy in decision-making.



“We need to protect our streams and wetlands that are the water source for many of our communities, especially for our EJ communities now and for our future generations. And we need to engage EJ communities to look at local solutions.”

Dr. Hector Gonzalez, M.D.

G. Exemptions

Exemptions for stormwater and green infrastructure are important for local government. Local governments would be supportive of a revised rule that would retain codification of the waste treatment exemption. It should also extend to MS4s, stormwater ponds, settling basins recycled water facilities which depend upon artificially created wetlands and storage ponds to treat millions of gallons of water a day. There has also been a major concern of county governments that roadside ditches are exempt. The revised rule should affirm that reservoirs along with influent and treated effluent storage ponds are within the scope of the waste treatment exemption, consistent with the regulatory definition of “complete waste treatment system” found in existing federal regulations including features such as storage ponds, basins, artificially created wetlands, recycled water reservoirs and other features associated with water recycling.⁶

⁶ 1 See 40 C.F.R. §35.2005(b)(12), defining “complete waste treatment system” as “all the treatment works necessary to meet the requirements of title III of the [CWA], involving . . . the ultimate disposal, including recycling or reuse, or from the treatment process.”

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The availability and cleanliness of our water supply is paramount to building a great nation. Mayor Sal Panto, Easton, PA

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H. Permitting Reform

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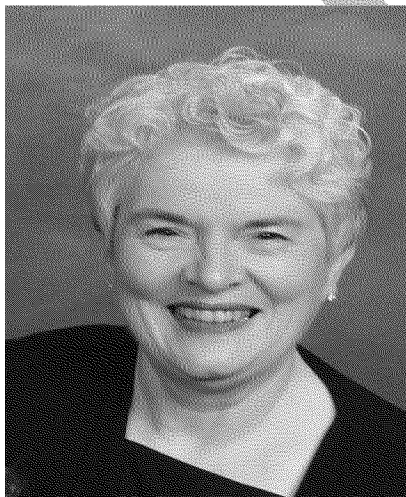
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CWA Section 404 permitting is complex and outdated. Agencies' budgets and staffing are overwhelmed and lack resources to respond to individual permits. At the same time, the private sector confronts time-consuming requirements that pose significant delays and economic burdens.



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**Commissioner Victoria Reinhardt
Ramsey County, MN**

Permitting can be made more efficient and more effective. For example, permitting length of time can be done more efficiently (less than 60 days) and it can also be more flexible, decentralized and integrated

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"It's not just about getting a permit done quickly. It's about why you have the permit in the first place. As long as we keep in mind that it's about our environment, and it's about our water, we can implement that in any way we choose."

Commissioner Victoria Reinhardt, Ramsey County, MN.

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with community goals. Local governments would be generally in favor of State Assumption of the 404 program. Also, further consideration of General Permits and mapping would aid in permitting reform.

I. Agriculture and Rural Communities



Agriculture and rural communities have expressed concerns about the Waters of the U.S. Most of the concern of the rule has been whether it would modify existing statutory provisions that exempt "normal farming and ranching" practices from dredge and fill permitting or others that exclude certain agricultural discharges, such as irrigation return flow and stormwater runoff, from all CWA permitting. The other key area of concern was the confusion whether or not ditches were exempt.

Fencing Livestock, Lexington, KY-Photo Source, Eric Vance, EPA

Normal agricultural and silvicultural practices are exempt but the interpretive rule issued in 2014 (later rescinded) to clarify the 56 practices that are exempt from CWA Section 404 permitting was very confusing to farmers. Other issues for rural communities is the NPDES permits for application of pesticides and herbicides in WOTUS. Also, there is a concern that 'prior converted croplands' which are exempt if they are certified by NRCS are also exempt from wetland regulations administered by the Army Corps of Engineers and EPA (Section 404 of the Clean Water Act). However, if the land changes to a non-agricultural use, or is abandoned, according to the criteria established by the Corps and EPA, it may be regulated under the CWA. These issues combined with the complexity of the WOTUS and the role of the NRCS poses significant issues for the agricultural sector and rural communities.



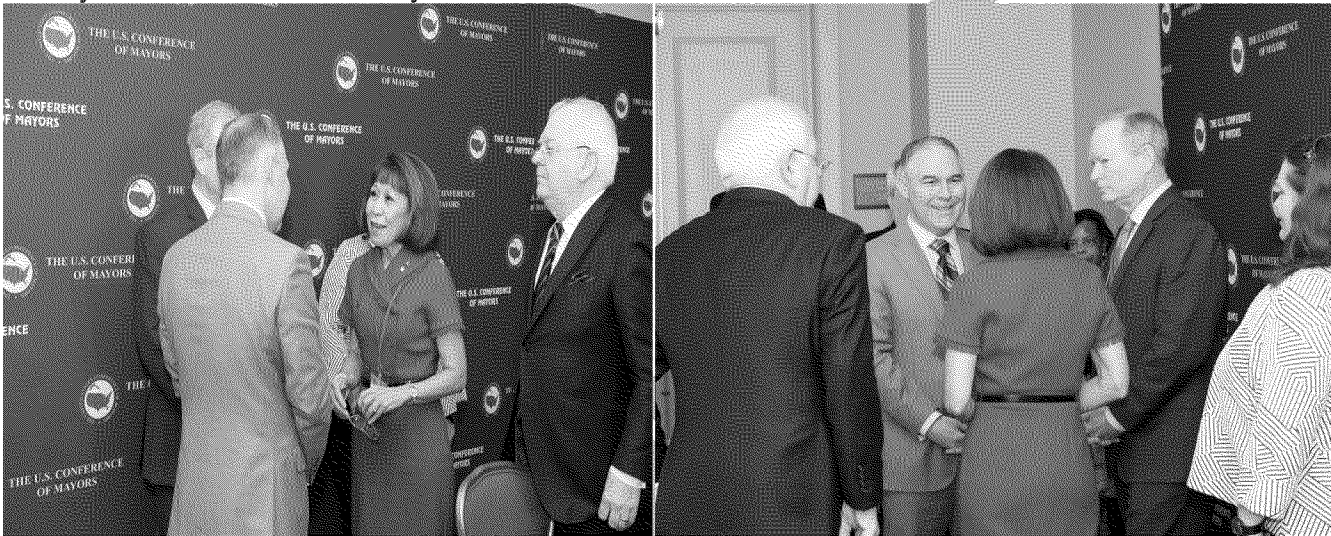
"The Small Community Advisory Subcommittee (SCAS) received many great comments from across the nation, particularly as the issue applies to agriculture and small communities. We have done our best to incorporate them into our recommendations, and hope we can help to formulate a clean water rule that can work across the nation."

*Commissioner Dr. Robert Cope, DVM
Salmon, ID, Chair of Small Community Advisory
Subcommittee*

Commissioner Dr. Robert Cope, DVM, Salmon, ID, Chair of SCAS

J. Outreach to Local Governments

There is a need for enhanced outreach to local governments. Its significance in WOTUS decision-making is all the more critical. A comprehensive communication strategy is needed for local governments that improves the channels of information distribution, and explicit communication at all levels of government. Getting information into the hands of local governments where it will have the most impact must be a priority. This is particularly relevant in small, disadvantaged and ethnically diverse communities. Local governments need to act effectively so that information will reach all relevant parties so it can also be readily communicated effectively to citizens.



Administrator Pruitt meets with Mayor Elizabeth Kautz, Burnsville, MN and Vice-Chair, Protecting America's Waters Workgroup-at the U.S. Conference of Mayors,
Photo Source: Eric Vance, EPA

Therefore, there will be a pressing need to improve governmental communication and transfer of information among the EPA, state, tribal and local governments, and to get that information out to the public. Specific tailored information for local elected officials is also needed to convey the effective changes of any new WOTUS rule.

"A change in culture is necessary in managing our water resources. Working together to solve our problems is what is needed rather than imposing fines on cities who already cannot pay. " Mayor Elizabeth Kautz, Burnsville, Minnesota and Vice-Chair of the Protecting America's Waters Workgroup



K. Financial Sustainability

One of the common themes heard by LGAC members revolves around affordability. This issue has several components including compliance, pollution and clean-up costs, punitive costs that only serve to reduce local government resources and the disproportionate costs for small and economically disadvantaged communities. If the goal is safe, clean water throughout the country, innovation in approach and cost allocation must be considered at the federal, state and local levels.



*"Waters of the U.S. needs an education piece so that others are given a clear understanding that clean and safe water is a precious resource connected to everything-the water we drink and the food we eat. And we have a responsibility to protect it not only this generation but the generations to come." Samara Swanston
Counsel to the New York City Legislature*

Samara Swanston, Counsel to the New York City Legislature

III. Response to Agency Findings and Recommendations

☐ **Question: 1-** How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined? How would you like to see the agencies interpret 'consistent with Scalia'? Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

1.a. How would you like to see the concepts of 'relatively permanent' and 'continuous surface connection' be defined?

Background

In the *Rapanos v. United States* 547 U.S. 715 (2006), the Supreme Court provided a plurality decision of four justices, led by Justice Scalia. The decision basically challenged federal jurisdiction to regulate isolated wetlands under the Clean Water Act. It also applied a very narrow interpretation to CWA jurisdiction, extending the agencies' regulatory authority only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a

continuous surface connection to" such relatively permanent waters. Justice Kennedy focused on whether the waters in question have a "significant nexus" to traditional navigable waters, *i.e.*, whether they, "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" The LGAC has previously commented that they would prefer a clear and simple approach for jurisdictional determinations such as an approach that yields categorical answers of jurisdiction in these categories: 'yes', 'no' or 'maybe' responses. Any of these answers are sufficient for local governments if these answers are provided in a timely fashion.

Recommendations



EPA and the Corps should apply simple approaches that yield jurisdictional calls with simple criteria that give a 'yes', 'no' or 'maybe' answer. (2014 LGAC Report)



The LGAC recommends the following Potential Approaches to Wetlands with a "Continuous Surface Connection" - "Relatively Permanent" Waters

Jurisdictional

- ✦ Streams with seasonal flows or streams with another offflow which should not capture ephemeral and intermittent streams into the definition of "relatively permanent" waters. Metrics and thresholds should be established when a stream is considered "relatively permanent." Such metrics will vary geographically on a case-by-case basis and the definition of thresholds will be subjective.
- ✦ Perennial streams only as "relatively permanent waters".
- ✦ Wetlands that directly touch jurisdictional waters are jurisdictional. However, there may also be circumstances where the current practice of considering wetlands with a continuous surface connection, regardless of distance, to be jurisdictional is not appropriate. Such connections should be perennial (and not include ephemeral and intermittent connections).
- ✦ Wetlands with permanent, continuously flowing, surface connections should be included as jurisdictional.

Non Jurisdictional

- ✦ Erosional features in the arid West, such as arroyos and dry washes should be 'non-jurisdictional'.
- ✦ Ditches and canals that only carry intermittent flows of water and that are not a relocated tributary or excavated in a tributary, as well as stormwater control features that periodically flow in response to significant precipitation events, should also be exempted.

- ✦ Develop metrics to identify when "some degree of connectivity" should not be utilized. This will require subjectively defining thresholds for what constitutes a significant degree of connectivity, which should be avoided if at all possible.
- ✦ Wetlands where connections do not exist should be exempted from jurisdiction.
- ✦ Overland flows that flow through dryland breaks to a WOTUS (rendering a tributary up gradient of the dryland break) should be non-jurisdictional.
- ✦ Water features that may be present (for example, residual ponds resulting from placer or other mining efforts) are not jurisdictional and where a continuous physical channel is absent; a bed-and-bank is not discernible; an ordinary high water mark is not observable; and/or there are no flow characteristics are not jurisdictional.

1.b. How would you like to see the agencies interpret 'consistent with Scalia'?

Background

EPA and the Corps issued the 2008 guidance document following the Rapanos case that was intended to clarify WOTUS. It does so by asserting CWA jurisdiction over waters that would meet *either* the plurality test (relatively permanent; continuous surface connection) *or* the Kennedy test (significant nexus). In the Guidance and Memorandum of Agreement between the Corps and EPA, there is a list of key questions and answers, that generally breaks the jurisdictional analysis into three major categories. *NOTE: This guidance did not go out sufficiently for public review and was not communicated well to local governments and other stakeholders.* The first, and presumably more manageable, category includes those waters over which CWA jurisdiction will be asserted in every case; those that do not and the maybe that have a 'significant nexus'.

Recommendations:

■ Criteria as outlined in the 2008 guidance should be used for a revised rule which provides criteria.

■ Definitions should be modified to address clearer definitions. A series of questions using criteria should be used to determine 'relatively permanent or continuous'. If answers are 'yes' or 'no' it leads to a 'yes', 'no' or 'maybe' jurisdictional determination. If there is a 'maybe', it diverts to state specific criteria for jurisdictional determination.

1.c. Are there particular features or implications of any such approaches that the agencies should be mindful of in developing the step 2 proposed rule?

■ EPA and the Corps should establish an Interagency Taskforce to develop the matrix of questions to determine 'permanent' and 'continuous' indicators. Their results should be published and the public given the opportunity to give comment. (LGAC 2014 Report)

634 The LGAC recommends the following state specific criteria for the revised rule:

635 **Intermittent streams, playa lakes, wetlands, and other waters:**

636 In cooperation with states, the EPA should designate intermittent streams and other waters as non-
637 waters of the U.S. based on the following criteria:

638 ☐ Seasonal flow of running or standing water — each state to develop its own criteria subject
639 to EPA review and approval;

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641 Because of the variability of conditions within and between states, the EPA should provide guidelines
642 for state standards that include factors to be considered, but which do not constitute federal
643 standards.

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645 Such factors to include are:

- 646 ☐ Average number of days of stream flow;
647 ☐ Seasonality of stream flow;
648 ☐ Rate of stream flow;
649 ☐ TMDL levels during such periods, amount of water and TMDLs delivered to the "discharge"
650 body of water; and
651 ☐ Any other relevant factors as the Agency deems appropriate.

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653 State standards/factors should reflect possible ground water recharge rates from intermittent
654 streams, playa lakes, wetlands, and other waters. Similarly, factors should include potential
655 contamination of ground water from such water bodies.

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657 States shall develop metrics for each standard they propose and submit to the EPA for review and
658 approval. EPA to have 120 days from receipt of a completed state plan to review, propose revisions,
659 or deny the submitted standards and metrics. Failure to complete the analysis within 120 days,
660 subject to the EPA and state agreeing on a time extension, shall result in the submitted standards
661 and metrics being deemed accepted.

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663 Three years after the state -submitted standards are accepted, each state shall submit a report to
664 the EPA detailing whether the waters in question continue to meet the EPA -accepted standards, as
665 determined by the state's metrics. The EPA shall determine whether each state shall submit
666 subsequent reports on an annual or other timeline basis.

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669 Generally accepted scientific findings on issues that may affect water quality standards related to
670 intermittent streams, playa lakes, wetlands, or other designated waters are determined, the EPA
671 may request states review their standards and submit proposed revised plans for the Agency's
672 consideration and approval.

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Permanent Bodies of Water:

- Many wetlands are seasonal and have been addressed above. For those that are permanent, states should be empowered to develop metrics that demonstrate whether the waters released from the wetlands to jurisdictional waters are "cleaner" than the waters that otherwise would flow to those jurisdictional waters if the wetlands were not present.
- States should submit proposed criteria and measurement techniques to the EPA for review and approval. EPA should have 120 days from receipt of completed state plan to review, suggest revisions, and approve or deny the submitted plan. If the review is not completed within 120 days, subject to extension if the EPA and state agree, the submitted plan shall be deemed accepted.
- States should be encouraged to develop criteria and metrics regarding wetlands and other water bodies that impact on ground water quality.

An application for Smart phone or hand-held computer should be developed to give a quick jurisdictional determination and sent to all interested parties. (LGAC 2014 Report)

Manmade conveyances, stormwater treatment systems, ditches, farm and irrigation ditches and green infrastructure amenities should be exempt from jurisdiction. Where possible, EPA and the Corps should work with State, local and tribal governments to map these features as well. *NOTE: Drinking water and wastewater treatment utilities may have these features mapped as part of Asset Management features.* (LGAC 2014 Report)

☐ **Question 2-** What opportunities and challenges exist for your locality with relying on Justice Scalia's opinion?

Background

Cities and communities care deeply about the quality of water. One concern is that a rule that is left entirely to interpretation and does not provide sufficient clarity, may add to costs and delays without causing important improvement to water quality. (*Iowa NLC's letter*) We understand that the goal is to make it easier to identify WOTUS and a rule interpreting the Scalia decision may not draw bright enough lines for local governments to easily identify those waters affected. Therefore, the use of the Scalia approach in and of itself is unlikely to significantly resolve all of the considerable uncertainty surrounding CWA jurisdiction (either then or now), or prevent continuing litigation to test the agencies' interpretations in the federal courts. However, the 2008 guidance does have criteria that will pose less uncertainty and yield faster results. If the 2008 guidance were to be revised to include clearer definitions with input from states, local and tribal governments and other stakeholders and state specific criteria it could perhaps help to resolve these issues.

Recommendations:

Relying on a modified Scalia approach and incorporating the 2008 guidance into a revised rule can provide a clearer certainty of federal jurisdictional waters which will lead to more certainty and more ease in permitting.

Question 3: Are there other approaches to defining “waters of the U.S.” that you would like the agencies to consider to providing clarity and regulatory certainty?

Background

The 2008 guidance document (issued post- Rapanos) offers assistance and criteria to assess jurisdiction of WOTUS (post- Rapanos). It is consistent with the Scalia approach but also asserts criteria to be used for further consideration of CWA jurisdiction (over some waters). This approach would reflect the opportunity to cover waters significant to states, locals and tribes. The new WOTUS rule should also confirm certain exemptions from federal jurisdiction, offering federal clarification where there has previously been uncertainty. These exemptions include stormwater detention ponds, wastewater treatment facilities, and “puddles.”

Recommendations:

The LGAC recommends that a similar approach articulated in the guidance to the 2008 guidance be used to revise the WOTUS rule.

“Significant nexus” test refers to waters that “significantly affect the chemical, physical, *and* biological integrity” of traditionally navigable waters, the 2015 WOTUS Rule covers waters that affect the “chemical, physical, *or* biological integrity” of navigable waters. That should be changed to ‘and’ and include all three parameters. (LGAC 2014 Report)

The 2015 rule regulates any area having a trace amount of water if it also has – or ever had – a bed, banks, and an ordinary high water mark (OHWM). This could include many channels and other features that are almost perpetually dry. For the 2017 revised rule, there should be more predictability and certainty in general if there is a dry bed with a OHWM (with historical aerial or infrared photography that it can be established as a WOTUS) or exempt.

Question 4-The agencies’ economic analysis for step 2 intends to review programs under CWA 303, 311, 401, 402 and 404. Are there any other programs specific to your locality that could be affected but would not be captured in such an economic analysis?

Background

A revised Clean Water Rule is expected to have increased clarity and certainty to the process of making jurisdictional determinations under the CWA. Individual jurisdictional determinations can be time-consuming and resource-intensive for the agencies, permittees, business community and local governments. A final rule should be designed to reduce the uncertainty and clarify categories of waters that are jurisdictional or not jurisdictional by simplifying the process. Clarifying the CWR will reduce the costs and have positive economic benefits. However, the rule itself does not incur direct costs. The rule only applies

when a permit is required for a pollutant discharge that would degrade, pollute or destroy a waterbody. On a positive jurisdictional call, it is uncertain the direct costs and who would pay the costs. More clearly defined exemptions will lessen the trigger for a CWA permit. However, it is uncertain the costs of positive or negative determinations which could both potentially trigger activities potentially threatening or polluting waterways. This is especially a concern of local governments as it applies to waterbodies that are used for drinking water sources. Because of the high costs of water treatment to meet drinking water standards these costs are often transferred directly to the rate payer and citizens. If a waterbody is polluted or destroyed, then cost at the local level could pose serious economic costs. Whereas, under a CWA permit, the permittee would seemingly be required to pay mitigation costs rather than the costs transferred to the local government or rate payer. Also, as state or local programs assume more authority, likely with more efficiency, the costs to manage and assume these permitting burdens could drastically increase. And states and local governments would not be able to assume these costs. Therefore, the economic analysis should be broad and the direct and indirect costs be considered.

Recommendations:

The Economic Analysis should be broad to include impacts to not only Clean Water Act programs but also state and local programs.

Below are programs from a local government perspective that should be considered in the Economic Analysis:

- ✦ **Source Water Protection**-There is a general consensus that protecting the nation's water resources is important to local government. Local governments realize that poor water quality affects the health and economies of their communities, disproportionately impacting those that are low-income. Local governments also realize that protecting source water bodies like rivers, lakes, streams, wetlands and groundwater is paramount to protecting drinking water. (LGAC 2016 Drinking Water Report). **Under the Safe Drinking Water Act**, Source Water Assessments (SWAs) provide information about sources of drinking water used by public water systems. SWAs are studies or reports developed by states to help local governments, water utilities, and others protect sources of drinking water and are done differently by each state. Each program is adapted to a state's water resources and drinking water needs. To protect source water, the tools of the Safe Drinking Water Act (SDWA) and Clean Water Act (CWA) programs are utilized to protect source water. Additional protection tools can be found in other EPA programs and various agricultural programs. Changes made to CWA programs may greatly impact state and local source water protection programs and plans. This could have significant economic impacts to local communities. For example, in Flint, Michigan shifting the source water to the Detroit River water resulted in significant deterioration of water quality that produced significant public health and economic problems. In Portland, Oregon where source water is protected it results in less cost to the rate payers by having Clean Water Protection programs in place. It is unclear how changes in a revised rule will impact streams and tributaries that impact local sources of drinking water. If adequate CWA protections are not in place it could have significant negative economic impacts to water utilities. This costs are likely be transferred to local governments and rate payers. It is also unclear how this may impact the prevalence of toxic algal blooms which have proved very costly on drinking water.

- ✦ **CWA Section 402** - The NPDES permits and discharges could hold significant economic issues for local governments in regard to WOTUS for wastewater treatment, stormwater management, CSOs, and application of pesticides (used for vector control). There has been a concern about

expanded federal jurisdiction to previously unregulated streams, ditches, and wetlands. However, the final rule includes exclusions beneficial for those that operate MS4s. The rule includes key exclusions that may be useful for localities. The rule retains a long-standing exclusion for “waste treatment systems,” such as treatment ponds and lagoons. It also adds new exclusions for artificially created ponds, settling basins, construction and mining excavation pits, and wastewater recycling structures. Lastly, the rule finally codifies the well-understood principle that the CWA does not apply to groundwater. For MS4s, the primary concern about the rule has been that it could potentially be used as parts of an MS4 – including stormwater drainage ditches, BMPs, and green infrastructure projects – are “waters of the US.” That could mean, for example, that NPDES permit coverage would be required to discharge **into** an MS4 or that a CWA 404 permit would be required to do maintenance on a BMP. The final rule includes, for the first time, a regulatory exclusion for “Stormwater control features constructed to convey, treat, or store stormwater that are created in dry land.” However, the exclusion does not apply to ditches that were created in previously existing streams or wetlands. The rule’s exclusions are important because they take precedence over the rule’s jurisdictional tests. For example, a stormwater conveyance ditch that qualifies for the stormwater exclusion would be excluded from CWA jurisdiction even if the ditch would be considered a jurisdictional water under the tributary test. Furthermore, in a reversal of EPA and the Corps’ previous position, the agencies stated that they do not retain any discretion to extend CWA jurisdiction to water features that qualify for one of the rule’s exclusions. It is unclear how a revised rule will impact Section 402 permits. Potentially, Section 402 permits could prove more costly than Section 404 permitting at the local level in regard to stormwater and wastewater treatment.

- ✦ **Pesticide Applications in Waters of the U.S.** - Since 2011, pesticide applications into, over, or near WOTUS are permitted under the CWA National Pollutant Discharge Elimination System (NPDES) Program due to a 2009 U.S. Court of Appeals for the Sixth Circuit ruling. Agricultural producers, pesticide applicators and local governments have opposed or expressed concerns on the permitting largely on the grounds that it is duplicative and unnecessary to regulate pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Local governments, mainly county governments are largely responsible for vector control programs to manage mosquitos and spraying of insecticides to reduce vectors and public health concerns. Although the CWR would have arguably expanded the scope of the waters requiring pesticide permitting, the replacement or elimination of the CWR will not end NPDES requirements for pesticides however it may provide opportunity to clarify what discharge waters are subject to federal versus state permits.

- ✦ **Section 303 (d)**- Currently, The National Rivers and Streams Assessment (NRSA) 2008-2009 report provides information on the biological and recreational condition of the nation’s rivers and streams and the key stressors that affect them. The Report indicated that about half of our nation’s streams (some of which provide sources of drinking water) have poor water quality. Poorer water quality could result in significant treatment costs such as Impaired Water sites under CWA Section 303(d) and transfer the costs to local governments. In addition, communities that rely on these water bodies for drinking water and source water the cost will ultimately be transferred to rate payers having a significant economic impact to local governments. It is uncertain how changes in a revised WOTUS rule will impact on local governments and their local efforts to improve access to clean water.